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No. 87-958

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In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND LIEUTENANT OTTO J. BINKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners established that a mandatory retirement age of sixty for state police officers is "a bona fide occupational qualification reasonably necessary to the normal operation" of the Pennsylvania State Police, within the meaning of Section 4(f)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 623(f)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 829 F.2d 392. The opinion of the district court (Pet. App. 36a) is reported at 645 F. Supp. 1545.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a) was entered on September 21, 1987. A petition for rehearing was denied on October 19, 1987 (Pet. App. 39a). The petition for a writ of certiorari was filed on December 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under Pennsylvania law, all state police troopers with 20 years of service must retire at age sixty (Pa. Stat. Ann. tit. 71, § 65(d) (Purdon Supp. 1987)). In 1983, the Equal Employment Opportunity Commission (EEOC), on behalf of all persons adversely affected by that mandatory retirement law, and Lieutenant Otto J. Binker of the Pennsylvania State Police (PSP), on his own behalf, brought separate actions (subsequently consolidated) in the United States District Court for the Middle District of Pennsylvania challenging the validity of the law under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.* Section 4(a)(1) of the ADEA makes it unlawful for an employer "to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)).

Following a trial, the district court denied relief on the ground that the Commonwealth's mandatory retirement age for state police officers does not violate the ADEA. See 596 F. Supp. 1333 (M.D. Pa. 1984). The court agreed with petitioners that the mandatory retirement age falls outside the scope of the ADEA's ban on age discrimination because it is a "bona fide occupational qualification" (BFOQ), within the meaning of Section 4(f)(1) of the ADEA (29 U.S.C. (& Supp. III) 623(f)(1)), which exempts "reasonably necessary" BFOQs from that ban. See 596 F. Supp. at 1336-1348.

2. The court of appeals vacated the district court's decision and remanded for reconsideration in light of this Court's intervening decisions in *Johnson* v. *Mayor of Baltimore*, 472 U.S. 353 (1985) and *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400 (1985). See 768 F.2d 514 (3d Cir. 1985). In *Johnson* and *Criswell*, this Court endorsed a two-part inquiry that requires an employer relying on a

BFOQ defense to make a "particularized, factual showing" that, first, "the job qualifications * * * [are] reasonably necessary to the essence of his business" and, second, "the employer is compelled to rely on age as a proxy for the * * * job qualifications validated in the first inquiry" (see 472 U.S. at 362; 472 U.S. at 413, 414 (citation and emphasis omitted)). The court of appeals concluded that remand was warranted because the district court had apparently assumed that good health and physical strength are job qualifications reasonably necessary to the essence of the PSP's operations and had not made the required particularlized factual findings (see Pet. App. 4a).

3. On remand, the district court again concluded (Pet. App. 11a-36a) that petitioners had not violated the ADEA because the Commonwealth's mandatory retirement age for state police officers is a BFOQ. The court found (*id.* at 15a) that "[g]ood health and physical fitness, strength, and dexterity are job qualifications reasonably necessary to the essence of the State Police business" (see *id.* at 15a-21a, 27a-31a). The court also found (*id.* at 21a) that petitioners "are compelled to rely on the mandatory retirement of officers at age 60 as a proxy for individual testing of older officers for the presence of the good health, physical fitness, strength and dexterity required to perform the job of a state police officer" (see *id.* at 21a-27a, 31a-35a).

4. The court of appeals reversed (Pet. App. 1a-10a). The court concluded that the district court's finding that good health, physical fitness, strength, and dexterity are job qualifications reasonably necessary to the essence of the operation of the state police is clearly erroneous. According to the court of appeals (*id.* at 8a), "[t]he factual findings supporting the district court's treatment of the first prong of the BFOQ defense do not include the determination that the department in fact presently requires all

state troopers to maintain a minimum level of health and fitness. Nor would the record support such a finding." "Before a characteristic can be a reasonably necessary BFOQ," the court held (*id.* at 9a), "it must be a trait that the employer at least attempts to require of employees of all ages." Hence, the court concluded (*id.* at 8a), "[u]ntil minimum standards are developed, implemented and enforced, the PSP cannot justify its mandatory retirement law by relying on good health and physical conditioning as BFOQs reasonably necessary to PSP business." The court stressed (*id.* at 9a) that the record in this case suggests that most of the younger officers did not possess the purported BFOQs.

ARGUMENT

The decision of the court of appeals, holding that the district court clearly erred in finding that the first prong of the *Criswell* test had been met, is both correct and highly fact-specific. Although it is inconsistent with the decision of another circuit, the continuing importance of the conflict has been greatly diminished by recent amendments to the ADEA, which prospectively exempt from Section 4(a)(1)'s ban on age discrimination state and local mandatory retirement laws that apply to law enforcement officials. Accordingly, the petition should be denied.

1. As the court of appeals explained (Pet. App. 9a), a trait can justify a mandatory retirement age only if it is a trait that an "employer at least attempts to require of employees of all ages." The court of appeals noted (*id.* at 7a), however, that the Commonwealth has "admitted that it presently has no mandatory minimum fitness standards." The absence of any standards relating to fitness, health, strength or dexterity—whether enforced or not—was supported in the record not only by petitioners'

admission, but by the failure of the district court to indicate what minimum level of particular traits is necessary to the performance of state trooper duties (*ibid.*), and by suggestions in the record that most of the younger officers do *not* possess the purported BFOQs (*id.* at 9a).[1] In addition to the fact that no such standards or requirements were even in existence, the court commented on the absence of any implementation or enforcement program, especially with regard to fitness (*id.* at 8a-9a). The court of appeals further made clear its view that the ADEA "does not require perfect monitoring and maintenance of a particular qualification at all age levels" (*id.* at 6a). Contrary to petitioners' claim (Pet. 12), the court cannot fairly be said to have held that the first prong of *Criswell* is satisfied only where minimum standards of health and fitness are developed, implemented, and enforced, through "regular testing," and "sanctions and eventual dismissal of non-qualifying employees."

Hence, it was the total absence in the record of either a "particularized factual showing" or any evidence to support a finding that petitioners had in effect any require-

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[1] Contrary to petitioners' suggestion (Pet. 11 n.7), the evidence in the record does not support, and the district court did not specifically find, either that "younger employees * * * are capable of" performing the tasks from which the Commonwealth deduced the type of fitness skills required for a state police officer, or that petitioners assign to "limited duty status" all officers with "medical deficiencies" that render them unable to perform the duties of a state trooper. With regard to the latter, the district court found (Pet App. 20a-21a) only that there was some "limited monitoring of the health and fitness" of state police officers and a "limited duty status program" for "temporarily disabled" officers. As the court of appeals found (*id.* at 8a (emphasis in original)), "[t]he district court's findings primarily concern the *health* of [state police] officers, not their fitness levels" and the district court made no finding that the troopers must maintain a minimum level of health and fitness.

ments relating to the health and fitness of employees, that properly prompted the court of appeals to reject petitioners' BFOQ defense. See *Johnson* v. *Mayor of Baltimore*, 472 U.S. at 362. The decision of the court of appeals is therefore both fact-specific and represents a reasonable construction of this Court's decisions.[2]

2. While there is some basis—because of the fact-specific character of the court of appeals' holding—on which to contend that no square circuit conflict exists, substantial inconsistency exists between the decision of the court below and the decision of the First Circuit in *EEOC* v. *City of East Providence*, 798 F.2d 524 (1986).[3] The First Circuit's decision focuses primarily on the dispensability of fitness testing (798 F.2d at 530) to the legality of a mandatory retirement program, and in that respect differs in

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[2] *Criswell* involved a mandatory retirement age used as a proxy for the increased tendency to "possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance" by a flight engineer (see 472 U.S. at 407-408). In affirming a judgment for the plaintiffs, the Court did not fault the jury instructions for failing to require that the employer prove the existence of basic standards requiring that all flight engineers be free of such traits. The jury instructions may have lacked such a requirement in part because the employer sought to justify its practice on the ground that there was no effective way to test for the risk of sudden heart attack or other events imperiling passenger safety, let alone to articulate a basic minimum standard (see 472 U.S. at 406). In this respect, that case differs from this one, where at least some aspects of the qualities of fitness, strength, and dexterity can be stated in terms of minimum requirements. In any event, this Court's omission in *Criswell* to fault the lower courts for failing to require the existence, where feasible, of generally applicable minimum standards, does not necessarily indicate approval of that practice, since the judgment was against the employer.

[3] The court of appeals was explicit in "reject[ing] the analysis in *EEOC* v. *City of East Providence*" (Pet. App. 9a). The First Circuit in

emphasis from the instant case. However, it also appears to have involved a program, like that involved here, where no identifiable fitness and health standards had been formulated. That the program was upheld in *City of East Providence* notwithstanding that fact places the decision in conflict with the instant case.

City of East Providence, on the other hand, noted (798 F.2d at 530) that the "city's acceptance of low physical standards, coupled with other facts, might persuade a district court that physical fitness was not deemed a necessary job qualification by that police force."

The decisions of the Third Circuit in this case and of the Eighth Circuit in *EEOC* v. *Missouri State Highway Patrol,* 748 F.2d 447 (1984), cert. denied, 474 U.S. 828 (1985), are distinguishable in a more fundamental respect. The Eighth Circuit's discussion of the legal relevance of physical examinations and fitness programs, which it discounts, is confined to the second prong of the BFOQ analysis (see 748 F.2d at 453-454). The Third Circuit's ruling in this case, however, is concerned exclusively with the first prong. The Eighth Circuit's first-prong analysis, moreover, subjected the job qualifications at issue only to the most cursory scrutiny (see *id.* at 451) and, for that reason, would seem plainly contrary to this Court's subsequent decision in *Criswell,* which concluded that a "rational basis" scrutiny was not adequate under either prong (see 472 U.S. at 418-420 & n.30, 421-423).

Contrary to petitioners' claim (Pet. 14), the decision of the court of appeals does not conflict with the Fifth Circuit's decision in *EEOC* v. *University of Texas Health Science Center,* 710 F.2d 1091 (1983). The court of appeals in this case has not disputed the Fifth Circuit's ruling in *University of Texas* that "the ability of individuals to perform effectively can * * * be balanced against the need to fill vacancies" (710 F.2d at 1096). In that case, however, unlike this case, the question presented was whether the state employer could relax its fitness requirements by raising its mandatory retirement age ceiling without defeating its claim that fitness requirements were necessary. This case presents the distinct question, not raised in *University of Texas,* whether an employer has met the threshold requirement of establishing that fitness and other standards even exist for employees other than those of retirement age.

3. Any dispute between the court of appeals in this case and the First Circuit is of little continuing importance, however. In 1986, after *City of East Providence* had been decided, Congress amended the ADEA to allow, in effect, a state and local government to apply prospectively the very type of mandatory retirement law at issue in this case pending the results of a congressionally-mandated study. Section 3(a)(i) of the Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342, provides that it is not unlawful for state or local government "to discharge any individual because of such individual's age if such action is taken—(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and—(2) pursuant to a bona fide * * * retirement plan that is not a subterfuge to evade the purposes of [the ADEA]" (to be codified at 29 U.S.C. (Supp. IV) 623(i)).

This amendment, which became effective on January 1, 1987, and remains in effect through 1993,[4] does not apply to actions, such as this one, which were brought under the ADEA before its effective date (see Pub. L. No. 99-592, § 7(b), 100 Stat. 3345 (to be codified at 29 U.S.C. (Supp. IV) 621 note)). In confining the continuing significance of the question presented in this case to those few suits for retrospective relief that were brought against state and local governments before January 1, 1987, the amendment renders the circuit conflict a matter of little continuing importance.[5]

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[4] The amendment will cease to be effective on December 31, 1993, unless reenacted. See Pub. L. No. 99-592, § 3(b), 100 Stat. 3342 (to be codified at 29 U.S.C. (Supp. IV) 623 & note)).

[5] The 1986 amendment applies with regard to state and local mandatory retirement laws pertaining to firefighters and law enforcement

The 1986 amendments also require that the EEOC and Secretary of Labor study whether physical and mental tests can validly measure the ability of law enforcement officers and firefighters to perform their jobs, and to report the results of that study, along with recommendations regarding specific standards that such tests should satisfy, to Congress within four years. See Pub. L. No. 99-592, § 5(a) and (b), 100 Stat. 3343. The EEOC is instructed to propose guidelines within five years "for the administration and use of physical and mental fitness tests to measure the ability and competency of police officers and firefighters to perform the requirements of their jobs" (§ 5(c), 100 Stat. 3343). Congress, therefore, has itself determined that, if valid, tests of physical and mental fitness should be used and administered in the law enforcement area when the current exemption from the age discrimination ban is lifted.

Notwithstanding the conflict in the courts of appeals, therefore, the decision below does not warrant further review.

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officers, but not to private employees of similar occupations, as to whom cases raising comparable BFOQ issues are rare.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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